ance to the re-entry and repossession because of the presence of the defendants' enforcement squad and with a view to avoid the breach of the peace. The question asked here is: did he expect any trouble where a breach of the peace may occur, and if so what did he do other than offering no resistance? Did he lodge any police report regarding the illegal re-entry or for that matter was there any subsequent report lodged in connection with his allegation in the affidavit that he and the staff were coerced, intimidated and forcibly ordered out of the premises. Failure on this part in not producing or exhibiting any police report to this effect or in not mentioning of the same in the said affidavit influences me to favour and accept the defendants' version that the re-entry and repossession was done with the plaintiffs' consent. In addition, in the absence of any evidence regarding these allegations, I consider them to be just a bare allegation. For these reasons, I hold on the balance of probabilities that the plaintiffs have failed to prove that the dispossession was without their consent. Therefore s 8(1) of the Specific Relief Act 1950 cannot be invoked by the plaintiffs.

Assuming that I am wrong on my finding that the dispossession was with the consent of the plaintiffs I shall proceed to consider whether under s 8(1) of the Act the dispossession was otherwise in due course of law. What this expression 'in due course of law' means is explained in *Pollock and Mulla* (supra) at p 816:

> The words 'due course of law' are not merely equivalent to the word 'legally', for a thing which is prefectly legal may still be by no means a thing done 'in due course of law'. The expression 'due course of law' means the regular, normal process and effect of the law operating on a matter which has been laid before it for adjudication. Thus though a landlord is entitled to possession of his land from his tenant after the expiry of the period of tenancy, yet if the tenant holds over, he may not dispossess him of his own authority. If he does so, it is competent to the tenant to sue the landlord for possession under this section.

Mr Balasundram submitted that the dispossession was otherwise than in due course of law because there was waiver on the part of the defendants and the time of one week given in the notice dated 25 May 1987 and in compliance with s 235 of the National Land Code was unreasonable. First, counsel submitted that failure on the part of the defendants to re-enter and repossess the demised premises immediately after the expiry of seven days from the date of the notice, 25 May 1987, amounted to a waiver under s 234(3) of the National Land Code. It is a fact that the defendants repossessed the demised premises on 10 June 1987, a period of two weeks from the date of the notice. The question here is whether the extra seven days amount to an act on the part of the plaintiffs showing the intention to treat the tenancy as still subsisting and therefore constitute a waiver? In my my opinion, by merely giving a further time before the re-entry and not enforcing it strictly to comply with the term of the notice cannot in the circumstances of this case constitute a waiver. There must be some positive action of waiver (*Halsbury's Laws of England*, 4th Ed, Vol 27 para 429). What acts amount to a waiver – see, ibid, para 430.

Secondly, counsel argued that a period of seven days in the notice dated 25 May 1987 for the plaintiffs to deliver up vacant possession was unreasonable. He argued that the plaintiffs should have been given more time. Again, in my opinion, the question whether seven days is reasonable depends on the circumstances of each case and in this instance I find the period of seven days is reasonable. For the above reasons, in my judgment the plaintiffs have failed to invoke s 8(1) of the Specific Relief Act 1950 in their application.

Therefore, having considered the entire arguments and the affidavits in support of the application, I am satisfied that the defendants had exercised their right of forfeiture legally and in compliance with the provisions of s 234 of the National Land Code. The plaintiffs' application is accordingly dismissed with costs.

Application dismissed.

Solicitors: *Balasundaram & Co.*; *Andrew & Co.*

Reported by *Ng Sheau Jiuan*

Perwira Habib Bank (M) Bhd v Bank Bumiputra (M) Bhd

HIGH COURT (KUALA LUMPUR) – ORIGINATING MOTION NO F32-49-86
CHAN J
18 MAY 1987

Land Law – Land charged to defendant bank – Charge registered under National Land Code – Purchaser of apartment assigned all rights in apartment to plaintiff bank – Land Administrator ordered sale of land by public auction – Appeal by plaintiff bank against order – Whether actual or constructive fraud must be established to defeat title of first bank – National Land Code 1965, s 340(2)

The registered owner of a piece of land on which an apartment block stood had charged the land to the defendant bank in September 1983. This charge was duly registered under the National Land Code. However, in June 1983, a purchaser of one of the apartment units had obtained a housing loan from the plaintiff bank and had assigned all her rights to the apartment to the plaintiff bank because there was no strata title issued yet. Subsequently, at the conclusion of an inquiry held under s 261 of the National Land Code, the Land Administrator ordered the land to be sold by public auction.

The plaintiff appealed against the decision of the Land Administrator. Relying on s 340(2)(a) of the National Land

Code, the plaintiff contended that the defendant was aware at the time it took the charge that there were purchasers of the flats in the building and, therefore, fraud or constructive fraud was to be inferred.

Held, dismissing the appeal: (1) There is ample authority that actual fraud must be proved in order to defeat the indefeasibility provision of the statute. It has to be actual fraud and not constructive fraud.

(2) The chargee's knowledge that there were other people's prior beneficial interests in the land is not fraud.

(3) The Land Administrator was right in the present case in ordering the sale because existence of cause to the contrary had not been shown to his satisfaction.

[*Editorial Note:* The plaintiff bank appealed against this decision to the Supreme Court vide Supreme Court Civil Appeal No 235 of 1987. The Supreme Court, comprising Abdul Hamid CJ (Malaya), Abdoolcader and Syed Agil Barakbah SCJJ, dismissed the appeal with costs on 10 November 1987.]

Cases referred to

1 *Public Finance Bhd* v *Narayanasamy* [1971] 2 MLJ 32 (refd)
2 *Assets Co Ltd* v *Mere Roihi* [1905] AC 176 (follld)
3 *Tai Lee Finance Co Sdn Bhd* v *Official Assignee & Ors* [1983] 1 MLJ 81 (follld)
4 *Kheng Soon Finance Bhd* v *MK Retnam Holdings Sdn Bhd & Ors* [1983] 2 MLJ 384 (refd)

Legislation referred to

National Land Code 1965 s 340(2)

Jennifer Cheong (Miss) for the plaintiff.
James Puthucheary (*Ng Leong Huat* with him) for the defendant.

Cur Adv Vult

Chan J: This is an appeal brought under s 418 of the National Land Code 1965 from the decision made by the Land Administrator on 26 June 1986 whereby the land concerned was ordered to be sold by public auction. Section 263(1) of the National Land Code 1965 says that at the conclusion of an enquiry held under s 261, the Land Administrator shall order the sale of the land to which the charge in question relates unless he is satisfied of the existence of cause to the contrary.

The registered owner of the land on which the building (known as the Laxamana Apartments) stood charged the property to Bank Bumiputra (M) Bhd in September 1983. However, earlier in June 1983, a purchaser of one of the flats in the building had obtained a housing loan from Perwira Habib Bank (M) Bhd but, because there was no strata title for the flat, the purchaser assigned to Perwira Habib Bank all her rights in the flat.

As the charge has been registered under the National Land Code, the interest of Bank Bumiputra as chargee is indefeasible: see s 340(1) of the Code. The indefeasibility of the interest of the chargee bank shall not be extinguished except by reason of any of the circumstances specified in sub-s (2):

340.(2) The title or interest of any such person or body shall not be indefeasible –

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

Perwira Habib Bank's contention (relying on s 340(2)(a)) is that Bank Bumiputra was aware at the time it took the charge that there were purchasers of the flats in the building and, therefore, fraud or constructive fraud is to be inferred. Counsel relied on *Public Finance Bhd* v *Narayanasamy*.[1] This is what Ong CJ, in giving the judgment of the court, said at p 33:

> The appellants' insistence that the interveners had no rights whatsoever – except a right to damages against the respondent for breach of contract – is so plainly unconscionable that we are not at all surprised that the judge was driven to find fraud and collusion. We would have done the same.

In that case, the Chief Justice (to use the apt language of Mr James Puthucheary) was stretching the facts to fit into Procrustes' bed by saying that if it is unconscionable it is fraud. There is ample authority, starting with *Assets Co Ltd* v *Mere Roihi*,[2] which laid down that actual fraud must be proved in order to defeat the indefeasibility provision of the statute. It has to be actual fraud and not constructive fraud. It is also held by the Federal Court in *Tai Lee Finance Co Sdn Bhd* v *Official Assignee & Ors*[3] that the chargee's knowledge that there were other people's prior beneficial interests in the land is not fraud.

In my judgment, the law is that as laid down in *Tai Lee Finance*.The Land Administrator was right in the present case in ordering the sale because existence of cause to the contrary has not been shown to his satisfaction. Accordingly, I would dismiss the appeal with costs.

As for the case of *Kheng Soon Finance Bhd* v *MK Retnam Holdings Sdn Bhd & Ors*,[4] I find it difficult to reconcile it with *Tai Lee Finance* but perhaps it could be explained by this passage from the judgment of Salleh Abas CJ (as he then was) at p 390:

> We think that the default of the appellant to release the loan alone would be sufficient to dismiss its appeal, but when it is coupled with the equity of the purchasers and the appellant's own unreasonable conduct and attitude, we have no hesitation to dismiss this appeal altogether.

Appeal dismissed.

Solicitors: *Mah-Kok & Din*; *Skrine & Co.*

Reported by *Ng Sheau Jiuan*